No. 20,827

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

K. B. & J. YOUNG'S SUPER MARKETS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF FOR INTERVENOR BUTCHERS UNION LOCAL 193, AFL-CIO.

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Jurisdictional Statement.

Jurisdiction of this Court rests upon Sections 10(e) and 10(f) of the National Labor Relations Act (29 U.S.C. § 160(e), *et seq.*).

Intervenor appears pursuant to order of this Court filed on April 22, 1966, granting Intervenor's motion to appear herein.

Statutes Involved.

Section 7 of the National Labor Relations Act (29 U.S.C. § 157):

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of

such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a) of the Act (29 U.S.C. § 158(a)):

"it shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;"

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Issues.

1. Did the Petitioner succeed to its predecessor owner, Kelley's obligation to recognize and bargain with the Union; and did Petitioner's refusal to recognize the Union's contract with Kelley's Markets violate Section 8(a)(5) and (1)?

2. Did the Petitioner violate Section 8(a)(3) by causing the discharge of all of the meat department employees of the three former Kelley stores and refusing to employ former Kelley employees?

3. Did Petitioner violate Section 8(a)(1) and (3) by refusing employment to Newton and by discharging employees Baldwin and Brewton?

4. Is Petitioner and Jack Young's Super Market a single employer within the meaning of the Act?

ARGUMENT.

I.

Petitioner Succeeded to Its Predecessor Owner, Kelley's Obligation to Recognize and Bargain With the Union; and Petitioner's Refusal to Recognize the Union's Contract With Kelley's Markets Was in Violation of Section 8(a)(5) and (1).

Petitioner purchased the three Kelley stores, inventory, and good will [Tr. p. 255], acquired the lease by assignment, understood the operation of the same business at the same location, using substantially the same equipment. [Tr. pp. 328-329.] For a short period of time Petitioner operated under Kelley's name. [Tr. pp. 19, 92-94.]

It was the intention of Petitioner when it purchased the market that it would be "a non-union market". [Tr. p. 136.]

Petitioner in purchasing Kelley's Market knew that there was a Union contract in existence [Tr. pp. 251, 350]; and that while not an actual condition of sale, it was understood that all employees of Kelley's would be terminated as part of the sale. [Tr. pp. 252-253.]

Petitioner had informed Kelley's representatives "That they were not going to honor the Butchers collective bargaining agreement". [Tr. pp. 28-29.]

The collective bargaining agreement in effect between the Union and Kelley's Markets would have expired on January 15, 1965. [Tr. p. 30.] Notice of the purchase by Petitioner of Kelley's was received by the Union on April 21, 1964. [Tr. pp. 26-27.]

There was no substantial change in the method of operation or the kind of merchandise that was sold by Petitioner and the market remained a "super market". [Tr. p. 70.]

The Union, through Mr. Hodson, did request and demand recognition of its contract [Tr. p. 54], and this was for recognition of the existing contract with Kelley which contained the successor ownership clause. [Tr. p. 87.]

It has been consistently held that where there is substantial continuity in the "employing industry", the "successor" must assume the obligation of its predecessor to bargain with the Union representing the employees; in this connection factors to be considered are: was there a substantial continuation of the same business operation, was the same plant used, were the same persons or work force employed, were the supervisory personnel the same, was the machinery, equipment and methods of production the same, and were the same products and services sold and performed; and was the same name retained.

See,

Northwest Glove Co., Inc., 74 N.L.R.B. 1697, 20 L.R.R.M. 1300;

Krantz Wire and Mfg., 97 N.L.R.B. 971, 29 L.R.R.M. 1191;

National Labor Relations Board v. Armato, 199 F. 2d 800;

Johnson Ready Mix Co., 142 N.L.R.B. 437, 53 L.R.R.M. 1068.

If sufficient of the above factors exist, the successor has been held obligated to bargain with the Union on

request, even though the sale specifically excluded an assumption of the obligations of an existing collective bargaining agreement.

Randolph Rubber Co., 152 N.L.R.B. 46 (1965);

Colony Materials, Inc., 130 N.L.R.B. 105, 47 L.R.R.M. 1248.

See also

National Labor Relations Board v. Lunder Shoe Corp., 25 Labor Cases 68,233, 211 F. 2d 284 (1954);

Wackenhut Corp. v. United Plant Guard Workers, 332 F. 2d 954 (C.A. 9, 1964).

In *National Labor Relations Board v. Alamo White Truck Service,* 273 F. 2d 238 (C.A. 5, 1959) the Court held that a successor owner is bound by the terms and conditions of the collective bargaining agreement entered into by its predecessor, in the absence of unusual circumstances—the unusual circumstances were that the various tests of successorship were not met in this case and the Court would not hold two individuals who were conducting a sales and service agency as the successor to the White Truck Company who designs, manufactures and sells motor trucks.

Cf.,

Brooks v. N.L.R.B., 348 U.S. 96, 27 Labor Case 68,835 (1954);

National Labor Relations Board v. Auto Ventshade, Inc., 39 Labor Cases 66,374;

Wiley, Inc. v. Livingston, 376 U.S. 543, 84 S. Ct. 909 (1964).

While Petitioner did not employ a majority of the predecessor's former employees, it did cause the discriminatory discharge of all such employees. Under such

circumstances, there was a sufficient continuity of employment and, the "employing industry" remained essentially the same. Petitioner, by refusing to recognize and bargain with the Union, violated Section 8(a)(5) of the Act.

Piasecki Aircraft Corp., 123 N.L.R.B. 348, 280 F. 2d 575 (1960);

New England Web, Inc., 153 N.L.R.B. 1019, 49 *L.R.R.M. 1620.*

With regard to the Union's request for recognition, each time recognition was requested, it was denied by principals of Petitioner. [Tr. pp. 32, 67.]

This request or demand for recognition was really a demand for recognition of the contract in existence between the Union and Petitioner's predecessor, Kelley's. [Tr. p. 87.]

In any event, whether it was a demand for recognition by Petitioner, or a demand for recognition by Petitioner as the successor to a previously existing contract, is of no consequence, since Jack Young's, and Petitioner are deemed to be a single employer, and a demand for recognition and bargaining upon either is a demand for recognition and bargaining upon both.

In a letter Petitioner denied the Union recognition, because it claimed to have a good faith doubt of the Union's majority. [General Counsel's Ex. 3.]

The Petitioner's claimed "good faith doubt" as to the Union's majority, or representative status, was in fact based upon Petitioner's unlawful conduct, the discharge of all employees. Its refusal to recognize and bargain with the Union was not in good faith.

Joy Silk Mills, Inc., 85 N.L.R.B. 1263, 24 L.R.R.M. 1548, 185 F. 2d 732 (1950).

Under the circumstances there was sufficient demand for bargaining in an appropriate unit to support the finding that Petitioner's refusal to recognize and bargain with the Union was in violation of Section 8(a)(5) of the Act.

Further, the sale of Kelley's stores to Petitioner did not automatically terminate Kelley's contract with the Union, and Petitioner was required to honor such contract. By its refusal so to do, Petitioner is in violation of Section 8(a)(1) and (5) of the Act.

Wiley, Inc. v. Livingston, 376 U.S. 543, 84 S. Ct. 909 (1964);

Wackenhut Corp. v. United Plant Guard Workers, 332 F. 2d 954 (C.A. 9, 1964).

Petitioner's theory that it is a "small non-unionized firm" and therefore not a successor within the meaning of the Act, because it purchased from a "large unionized firm", is without basis in fact or in law.

(a) Factually Petitioner is of sufficient size to be subject to the jurisdiction of the N.L.R.B., and being subject to such jurisdiction it is bound by the rules of law set forth in N.L.R.B. and court decisions governing successor owners.

(b) Under these cases, the true test is not "a small non-unionized firm" versus "a large unionized firm", but on the contrary these cases hold that size alone is not the determining factor.

The test of whether a purchaser of a business succeeds to the obligations of a union contract of its predecessor is as set forth in this section *supra.*

II.

Petitioner Violated Section 8(a)(3) by Causing the Discharge of All of the Meat Department Employees of the Three Former Kelley Stores and by Refusing to Employ These Former Kelley Employees.

Petitioner, prior to sale, demanded of Kelley's that it discharge all of its employees, including meat department employees. [Tr. pp. 246, 354.]

After Petitioner commenced operation of the Kelley stores, former employees applied for jobs in the meat department; Hart, who had six years seniority, was told he must apply as a new employee [Tr. p. 134], and the supervisor of the meat department, Cleo Thompson, told him the store would be non-Union. [Tr. p. 136.] Hinds and Turner, former employees in the meat department, were told Petitioner had all of the butchers it needed. [Tr. p. 146.]

Barnum was informed in a conversation between William Young and Barnum's wife that a requirement of employment was that Barnum withdraw from the Union. [Tr. p. 219.] Further, Barnum was told by Cleo Thompson that if he wished to work for Petitioner, he would have to get out of the Union. [Tr. pp. 209-210.]

The conduct of Petitioner, in making as a condition of hire of former Kelley meat department employees their withdrawal from the Union, is obviously in violation of Section 8(a)(3).

Daniel Crean and Joseph Messore, 139 n.l.r.b. 73, 51 L.R.R.M. 1272.

It is further evident that Petitioner was determined to operate its meat department using only non-Union employees, based upon its conduct concerning the transfers of employees Brewton and Pappin, who were told they were being transferred so that they would not have to join the Union [Tr. pp. 102-103]; and by its policy of informing ex-employees of Kelley's, Turner and Hinds, that Petitioner had all of the meat department employees it needed, while at the same time it was attempting to hire new employees.

Nor is there any basis in fact for the discharge of Kelley's employees because of observed inefficiencies; the witness Young admits he observed no such inefficiencies in the meat department. [Tr. p. 319.] The witness Charles Young contends that he relied upon his ability to (determine efficiency) "tell by looking at a person whether they are active or inactive". [Tr. p. 345.]

It is of interest to note that the same "inefficient employees" were all offered employment conditioned on (1) their commencement with Petitioner as *new* employees, and (2) their withdrawal from the Union or their acceptance of a non-Union market as an employer. Obviously the alleged inefficient employees immediately upon becoming new employees who disavowed Union membership became sufficiently efficient to be employable by the Petitioner.

It is obvious that Petitioner required Kelley's to discharge its meat department employees as part of a preconceived and calculated plan in an attempt to avoid Petitioner's obligation to recognize and bargain with the Union with respect to the operation of the stores newly acquired by them from Kelley.

Where a purchaser-employer, to evade an existing collective bargaining agreement, requires the termination by the seller of all of its employees, that purchaser has caused the discriminatory discharge of the employees and is in violation of Section 8(1)(3) of the Act.

Northern California Chapter AGC, 119 N.L.R.B. 1026, 41 L.R.R.M. 1209.

Further, it would have been, under these circumstances, futile for other discharged employees who did not do so, to make known to Petitioner their availability for work.

Tidelands Marine Service, 140 N.L.R.B. 288, 55 L.R.R.M. 1005.

III.

Petitioner Violated Section 8(a)(1) and (3) by Refusing Employment to Newton and by Discharging Employees Baldwin and Brewton.

Newton telephoned Young and was informed by him that Petitioner had its own union [Tr. p. 222] and that she should get a withdrawal card from the Union. [Tr. pp. 222, 224.] When Newton told Young that she couldn't work without a union he withdrew his offer of employment. [Tr. pp. 223-224.]

This conduct is in violation of Section 8(a)(3).

Daniel Crean and Joseph Messore, 139 N.L.R.B. 73, 51 L.R.R.M. 1272.

About the first of June, Jack Baldwin, who had been employed at Brundage Lane since February, 1964 [Tr. p. 152], was transferred to Petitioner's Chester Avenue store after Baldwin indicated that he wouldn't cross the

picket line. [Tr. pp. 153, 155, 180.] After Baldwin had worked at the Chester store for two or three weeks, Bill Sing, store manager, asked him if he belonged to the Union and when Baldwin replied that he did, asked why. [Tr. pp. 156-157.] Baldwin also testified that several times he heard William Young mutter, "I don't know why you fellows need to belong to the Union anyhow." [Tr. p. 155.]

Just before his vacation, Baldwin had a conversation with William Young which gave him the impression that he wouldn't have a job when he returned from his vacation. When he mentioned these doubts to Young, Young assured him that his job was secure. However, on about August 31, 1964, the day before Baldwin was to report to work, Bill Young telephoned him and told him that business was slow and he was not needed anymore. [Tr. pp. 157-158, 194-195.] Petitioner contends that Baldwin was discharged because business was slow and he was inefficient in his new job as meat manager. [Tr. p. 196.]

Baldwin was replaced by Jerry Mundshau. [Tr. pp. 118-119.]

Young, however, considered Baldwin to be a fairly decent meat cutter [Tr. p. 312], but Baldwin was discharged and an apprentice meat cutter retained. [Tr. p. 379.]

Brewton testified that on about June 13, 1964, meat supervisor Thompson told her that he wanted to transfer her back to the Brundage store and transfer employee Pappin, then working at Brundage, to Roberts Lane, so that Pappin would not have to join the Union. [Tr. pp. 102-103.] When Brewton protested crossing the picket line, Thompson said if she refused to cross

the picket line and lost her job did she think the Union would get her another job [Tr. p. 103] and further told her to make up her mind whose side she was on, Young's or the Unions. [Tr. p. 103.] Later when Brewton definitely stated that she would not cross the picket line, Thompson discharged Brewton stating, "Well, we will mail you your check then."

William Young and Thompson contend that Brewton was discharged because business was slow and Brewton was inefficient; but she was efficient enough to work at the Brundage store. [Tr. p. 328.] Admittedly, however, Brewton was immediately replaced by Charlene Pappin, who was transferred from the Brundage Lane store. [Tr. pp. 397, 407.]

Petitioner's explanation of its reason for Brewton's transfer and discharge does not withstand scrutiny. In view of the fact that the Union demanded that Pappin join the Union, and Thompson's statements to Brewton about not wanting Pappin to have to join the Union, it is apparent that Petitioner's attempt to transfer Brewton to the Brundage store was, in fact, based on her union loyalties and was motivated by Petitioner's desire to frustrate the operation of the existing union-security agreement at the Brundage store.

Brewton's subsequent discharge for refusing to cross the picket line was directly based on union considerations and, as such, violative of Section 8(a)(3) of the Act.

Brewton's unwillingness to cross the picket line constituted concerted protected activity. *Cf., Redwing Carriers, Inc.,* 137 N.L.R.B. 1545, 50 L.R.R.M. 1440; *L. G. Everist, Inc.,* 142 N.L.R.B. 193, 53 L.R.R.M. 1017. Petitioner cannot argue that, in the interest of

continuing the efficient operation of its business, it could legally replace Brewton since Petitioner, by its attempted unlawful transfer of Brewton, placed her in the position of having to choose whether or not to cross the picket line. *Cf. National Labor Relations Board v. Mackay Radio and Telegraph Co.,* 304 U.S. 333.

Petitioner's alleged reason for discharging Baldwin does not withstand scrutiny. The issue of Baldwin's alleged inefficiency as a head meat cutter, a job he had held for less than a month before his vacation and subsequent discharge, was raised for the first time at the trial, and Petitioner's contention that business was slow is negated by Petitioner's Exhibit 7. In view of this, and against the background of Petitioner's union animus as evidenced by its conduct outlined above and Young's conversation with Baldwin immediately prior to Baldwin's vacation, Baldwin's discharge was violative of Section 8(a)(1) and (3) of the Act.

IV.

Petitioner and Jack Young's Super Market Is a Single Employer Within the Meaning of the Act.

Jack Young's Markets and Petitioner in truth and in fact is one operation. The separate corporate entities may be of significance to the owners, for tax, or other purposes, but insofar as the obligations of those corporations are related to the employees in the various markets, the legal guise of separate entities, and of two corporations, must be pierced and the substance of the market operation must govern.

Looking to its substance it is obvious that Petitioner and Jack Young's Markets are one and the same, and represent a single employer under the Act.

The transcript of the original proceedings before the N.L.R.B. Hearing Officer contains numerous statements that show beyond question that the two corporations are in fact a single employer, and that many persons had dual positions, working for both corporations.

(1) There were numerous exchanges of employees between Jack Young's Markets and K B & J, Petitioner herein. Those interchanges of employees were at the instance and request of the employer. [Tr. pp. 56-58.]

(2) Numerous employees were involved in these transfers:

Oscar Johnson [Tr. p. 59]
Carlos Perez [Tr. p. 59]
Dorothy Hill [Tr. pp. 59-60]
Jack Baldwin [Tr. pp. 60, 163]
Imogene Brewton [Tr .pp. 60, 94-95]
Jerry Mulhauser [Tr. p. 60]
Charlene Pappin [Tr. p. 61]
Dean Smith [Tr. p. 61]
Pat Huggin [Tr. p. 61]
Cleo Thompson [Tr. pp. 63-64]
Bill Sing [Tr. p. 265]

(3) That employees working at Petitioner's market, or at the Young's markets, were paid in separate checks for work at each separate store, but all of the checks had printed on them Young's Market. [Tr. pp. 96-97, 100-101, 164.] These check stubs are in evidence as General Counsel's Exhibit 13(b) and 14(a), (b), (c).

(4) Management and supervision of Petitioner's market and Jack Young's Markets were in many instances one and the same:

Bill Young was the "boss" at K B & J, and also at Jack Young's Markets. [Tr. p. 195.]

Cleo Thompson was the supervisor "over all the meat departments" (K B & J and Young's Market). [Tr. pp. 198-200, 335.]

Kenneth Roderick, supervisor of K B & J, when needed could be located at one of several of Young's Markets. [Tr. pp. 263, 270.]

William Young testified that he had authority to move people between Petitioner and Jack Young's Markets because "I have a dual job". [Tr. pp. 304-305.]

The bookkeeper for K B & J had an office at, and worked at the Jack Young's store in Visalia. [Tr. p. 341.]

(5) Ordering of meats and supplies for both companies was done by either company [Tr. pp. 175-176] and meat was transferred from one company's stores to the other company's stores with or without billing. [Tr. p. 333.]

Conclusion.

For the reasons set forth herein, the N.L.R.B. Decision and Order should not be reversed, and should remain in full force and effect, and the parties thereto should be ordered to comply with said Decision and Order.

Dated at Los Angeles, California, August 19, 1966.

Respectfully submitted,

CHARLES M. ARAK,
Attorney for Intervenor.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES M. ARAK,

APPENDIX.

Table of Exhibits.

Exhibit	Identification	In Evidence
General Counsel's:		
1(a)-1(y) (formal documents)	Tr. 5	Tr. 5
2 (collective bargaining agreements)	11	12
3 (letter, Specht to Hodson)	12	13
4 (letter, Hodson to Specht)	13	13
5 (letter, Frame to Hodson)	14	14
6 (letter, Hodson to petitioner)	15	15
7 (letter, Frame to Hodson)	15	15
8 (letter, Arak to petitioner)	15	16
9 (letter, Frame to Arak)	16	16
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11(a)-(b) (Brewton paychecks)	97	99
12(a)-(b) (Brewton paychecks)	97	99
13(a)-(b) (Baldwin paychecks)	98	100
14(a)-(c) (Baldwin paychecks)	164	165
Petitioner's:		
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2 (letter, Scully to Frame)	20	20
3 (letter, Hob Nob to Union)	73	73
4 (Brewton paychecks)	124	124
5 (Brewton paychecks)	125	125
6 (Brewton paychecks)	125	125
7 (sales volume record)	302	303
8 (list of employees)	302	
Union's:		
1 (newspaper ad)	69	69